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## Constitutional Law - Self-Incrimination

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mate occurrence of the home.”<sup>41</sup> Mr. Justice Murphy, dissenting in *Goldman* stated that it was the Court’s “duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation.”<sup>42</sup> The principles decided in this case will help to insure to the present generation, in a period of increasing technological advancement, the protection from unauthorized intrusion intended by the Framers of the Fourth Amendment.

*Jay Paul Kahle*

CONSTITUTIONAL LAW—SELF-INCRIMINATION—An accused gambler’s claim of constitutional privilege against self-incrimination provides a complete defense to federal prosecution for violation of federal tax statutes requiring gamblers to pay excise and occupational taxes.

*Marchetti v. United States*, 88 S. Ct. 697 (1968).

*Grosso v. United States*, 88 S. Ct. 709 (1968).

Convictions, in federal district courts, were secured against petitioners in *Marchetti* and *Grosso* for violations of the Federal Gambling Tax statutes.<sup>1</sup> The gambling tax statutes constitute a comprehensive system of congressional enactments designed for both revenue and regulatory purposes.<sup>2</sup> The statutes levy both a fifty dollar occupation tax (evidenced by a gambling stamp) on those contemplating the conduct of gambling enterprises, *i.e.*, those persons in the business of accepting wagers,<sup>3</sup> and a ten per cent excise tax on the proceeds of such wagering.<sup>4</sup> An obligation to pay either of the taxes cannot be satisfied without filing a special registration statement (occupation tax) or a return (excise tax) with the Internal Revenue Service. Both the completed registration statement and return contain extensive information relating to the “taxpayer’s”

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41. 277 U.S. at 474.

42. 316 U.S. at 138.

1. The general provisions of this tax may be found in INT. REV. CODE of 1954, §§ 4401-23. Unfortunately, all the pertinent provisions are not collected in one place, but are spread throughout the Code. As cited in succeeding footnotes, §§ 6107, 6103, 6011, 6653, 6806(c), 7201, 7203, 7262 and 7273(b) must be included to comprehend the terms of the tax more fully.

2. The wagering tax statutes grew out of the Investigations of Kefauver Crime Committee of the early 1950’s. Debate showed the statutes were designed in part as a revenue-raising measure. 97 CONG. REC. 6891, 12238 (1951). Some \$115 million has been collected under the wagering tax statutes since 1953. Yet, the amount of revenue produced by the taxes has decreased from \$10.5 million in the first year of collection to \$6.6 million in fiscal 1965, despite original estimates of \$400 million a year. See Caplin, *The Gambling Business and Federal Taxes*, 8 CRIME AND DELINQUENCY 371 (1962); McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 222-3.

3. INT. REV. CODE of 1954, § 4411.

4. INT. REV. CODE of 1954, § 4401.

gambling activities.<sup>5</sup> The information obtained as a consequence of the wagering statutes is readily available to state and federal authorities charged with enforcing statutes prohibiting gambling.<sup>6</sup>

Petitioners in *Marchetti* and *Grosso* were convicted of wilfully failing to register for and to pay the special occupational tax, and of conspiracy to evade payment of such tax. The petitioner in *Grosso* was also convicted of wilful failure to pay the excise tax imposed on wagering and conspiracy to evade payment of the tax. Petitioners contended that compliance with the federal wagering taxes here involved would require them to incriminate themselves, in violation of their privilege against self-incrimination guaranteed by the Fifth Amendment, in that they would have to admit to being gamblers—an illegal activity in their home states.<sup>7</sup> The Court of Appeals for the Second and Third Circuit affirmed the convictions of *Marchetti* and *Grosso*, respectively.

The Supreme Court of the United States granted *certiorari* to re-examine the constitutionality under the Fifth Amendment of the pertinent provisions of the wagering tax statutes and heard the cases together.<sup>8</sup> In what amounts to one decision, Mr. Justice Harlan, speaking for the majority in a seven to one decision<sup>9</sup> held that persons who properly

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5. Sec. 4412 of the Internal Revenue Code of 1954 requires that those liable to pay the occupation tax register each year with the director of their internal revenue district, listing one's name and address, his places of business, and the names and addresses of all persons who accept wagers from him. The Treasury Regulations provide that the stamp, evidencing payment of the occupational tax, may not be issued unless the taxpayer submits both the registration form and tenders the full amount of the tax. Accordingly, the Revenue Service has refused to accept the \$50 tax unless it is accompanied by the completed registration form, see *United States v. Whiting*, 311 F.2d 191 (4th Cir. 1962); *United States v. Mungiole*, 233 F.2d 204 (3d Cir. 1956); *Combs v. Snyder*, 342 U.S. 939 (1952). In regard to the excise tax, those liable for its payment are required to submit each month an Internal Revenue form compiled from the daily wagering records of the taxpayer. INT. REV. CODE of 1954, § 6011. If such return does not accompany the tax payment, the "money is not accepted." Brief for the United States on Reargument at 39, n.35, *Grosso v. United States*, 88 S. Ct. 709 (1968).

6. Sec. 6107 of the Internal Revenue Code of 1954 requires the internal revenue offices to provide to prosecuting authorities a listing of these who have paid the occupational tax. Sec. 6806(c) obliges taxpayers either to post the revenue stamp "conspicuously" in their principal places of business or to keep it on their persons, and to produce it on demand of Treasury officials. Although there is no statutory instruction that local prosecuting offices be provided listings of those who have paid the excise tax, it appears the Revenue Service has undertaken to tender this information to interested prosecuting authorities. See INT. REV. CODE of 1954, § 6103; Caplin, *supra* note 2, at 72, 77.

7. The laws in every state except Nevada include broad prohibitions on gambling and wagering. See PA. STAT. ANN., tit. 18, §§ 4603-07 (1963). In addition to the state statutes, there are a number of federal statutes also imposing such sanctions. See 88 S. Ct. at 700.

8. In the October 1966 Term of the Supreme Court of the United States the Court agreed to consider these issues in *Costello v. United States*, 383 U.S. 942 (1966). Upon *Costello's* death, *certiorari* was granted in the present cases.

9. Mr. Justice Marshall did not take part.

exercise the privilege against self-incrimination may not be convicted of failure to comply with any of the wagering tax provisions.<sup>10</sup>

The issue before the Court was not whether the wagering tax statutes were a constitutionally valid tax measure<sup>11</sup> but whether the registration methods employed by Congress in federal wagering tax statutes are consistent with the limitations created by the privilege against self-incrimination.

The Fifth Amendment secures the privilege of refusing to testify, either orally or by the compelled production of private written communications, both as to matters which directly incriminate, *i.e.*, to those matters which create a "real and appreciable" hazard of self-incrimination,<sup>12</sup> and as to those which may serve as a link in the "chain of evidence" culminating in conviction.<sup>13</sup>

The wagering tax statutes evidence an elaborate congressional scheme to compel testimony in aid of state law enforcement, since the statutes seem to be a plan to "tax" out of existence the professional gambler whom the states could not prosecute out of existence. The essential feature of this scheme is not the tax itself, but the registration statement or form which must accompany the payment of the tax. The registration requirement is directed at persons who had in the past been, or would in the future be, engaged in gambling activities that are unlawful in most states. The practical effect of this scheme is to force gamblers to incriminate themselves into conviction of state crimes or risk conviction for the federal crimes of nonpayment of taxes and nonregistration. Moreover, to influence the gambler to choose the former the state penalties are generally not as severe as those prescribed in the federal statute for avoiding the gambling tax.<sup>14</sup> By designing the present statute as a tax

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10. The conspiracy convictions against the petitioners were also reversed. It should be noted that Grosso did not, on appeal, raise the privilege against self-incrimination to counts charging him with failure to pay the occupation tax. However, the Court reversed this conviction against Grosso also.

11. See *Supra* note 2. It is an accepted principle that as long as the tax bears some reasonable relation to revenue raising, it will be upheld and the Court will not concern itself with Congress' regulatory motives in enacting the tax. *McCray v. United States*, 195 U.S. 27 (1904) (tax of 10 cents per pound on yellow margarine as compared to  $\frac{1}{4}$  cents per pound on white oleomargarine); *United States v. Doremus*, 249 U.S. 86 (1919) (special excise tax on dealers in narcotics); *Sonzinsky v. United States*, 300 U.S. 506 (1937) (special tax on dealers in firearms); *U.S. v. Sanchez*, 340 U.S. 42 (1950) (special tax on dealers in marijuana). *United States v. Kahrigier*, 345 U.S. 22 (1953), upheld the wagering taxes as a valid tax measure since it applied to all persons engaged in such business, regardless of whether such activity violated local laws.

12. *Brown v. Walker*, 161 U.S. 591, 599-600 (1896); *Rogers v. United States*, 340 U.S. 367, 374 (1950).

13. *Councilman v. Hitchcock*, 140 U.S. 547, 564 (1892); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

14. One who refuses to pay the wagering taxes could face a fine of \$15,000 and five

measure, an area where federal power is plenary, Congress was able to place a powerful deterrent on conduct punishable only by the states in exercise of their police power. Indictments have been brought against gamblers for violating local gambling statutes with no other evidence than the required registration forms which accompany payment of the taxes, and payment of wagering taxes has often been admitted in federal and state prosecutions for gambling offenses.<sup>15</sup> The payment of the taxes, requiring as it does a declaration of present intent to commence gambling activities (payment of the occupational tax), or the declaration that one is already engaged in gambling activities (payment of the excise tax), obliges the gambler to accuse himself of conspiracy to evade either state or federal gambling prohibitions.<sup>16</sup> Finally, even assuming that the information elicited by the tax could not directly incriminate the "taxpayer," it could undoubtedly be used to form a cumulative chain of evidence securing his conviction. State prosecutors are apprised of the "taxpayer's" places of illegal activity and also of the names and addresses of everyone who collects wagers from him. With this information, local officials are in a much better position to enforce state penal sanctions on gambling.<sup>17</sup>

In these circumstances, Mr. Justice Harlan asserted, it is not rationally possible to argue that the wagering tax scheme does not involve a "real and substantial" danger of incrimination to the taxpayer-registrant. The "setting" in which registration and payment are required includes a formidable array of federal and state criminal laws, thereby confessions of taking wagers past, present, or contemplated in the future would be relevant proof of wrongdoing.<sup>18</sup>

Despite the inherent incriminatory element present in the gambling tax statutes, two Supreme Court cases, *United States v. Kahriger*<sup>19</sup> and *Lewis v. United States*,<sup>20</sup> had held that the gambling tax provisions did

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years in prison. INT. REV. CODE of 1954, §§ 7262, 6653, 7201, 7273(b). Pennsylvania specifies a maximum fine of \$500 and/or one year in jail. PA. STAT. ANN., tit. 18, § 4601 (1963).

15. See, e.g., *Irving v. California*, 347 U.S. 128 (1953); *Commonwealth v. Fiorine*, 202 Pa. Super. 88 (1963).

16. See *Acklen v. State*, 196 Tenn. 315, 267 S.W.2d 101 (1954) (defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp).

17. The chain of evidence rule as used in the instant decisions refers only to the payment of the occupational tax in that payment of such tax would not necessarily establish that a taxpayer was engaged in a crime, but that does not mean that the tax does not incriminate. See Mansfield, *The Albertson Case: Conflict between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103. A few states have created a statutory presumption that possession of the wagering tax stamp is a violation of state law. See n.10 at 703 of 88 S. Ct. 697.

18. 88 S. Ct. at 702, 713.

19. 345 U.S. 22 (1953).

20. 348 U.S. 419 (1955) (the conviction of a District of Columbia resident for not purchasing the \$50 stamp was upheld on the basis of *Kahriger*).

not incriminate. It should be noted that these opinions concerned solely the occupational tax provisions. The Court never ruled on the excise portion prior to the instant cases. The majority opinion in *Kahriger* first examined the statutes as a tax measure,<sup>21</sup> and then considered the question of self-incrimination. The instant Court reconsidered the holding of *Kahriger* and *Lewis* that the privilege may not be appropriately asserted by those in petitioners' circumstances, in light of recent Supreme Court decisions, particularly *Albertson v. SACB*.<sup>22</sup>

In *Albertson* the compelled registration of Communist Party members in an area "permeated with criminal statutes"<sup>23</sup> was forbidden since Communists are a "highly selective group inherently suspect of criminal activities."<sup>24</sup> *Albertson* thereby enunciated the principle that where a governmental scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, it contravenes the Fifth Amendment privilege. In the instant case the majority found that the statutory system present in *Marchetti* and *Grosso* was of a kind condemned in *Albertson*. Therefore, the compelled registration of gamblers, who like Communists, are a "highly selective group inherently suspect of criminal activities" must be forbidden since every portion of the wagering tax statutes had a "direct and unmistakable consequence of incrimination."<sup>25</sup> After this determination the Court proceeded to distinguish or reject the premises on which the opinions of *Kahriger* and *Lewis* were based, concluding that *Kahriger* and *Lewis* did not preclude the assertion of the constitutional privilege as a defense to any action alleging failure to comply with the provisions of the wagering tax statutes.

The Court in *Kahriger* first stated that it was doubtful whether petitioner could raise the self-incrimination issue since he had failed to register, the presumption being that petitioner could have raised this defense only if he had filed the required registration form with his objections thereon. This suggestion was based on *United States v. Sullivan*,<sup>26</sup> where the defendant had refused to file an income tax statement claiming it would incriminate him. The Court there stated, however, that "[i]f

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21. See *supra* note 11.

22. 383 U.S. 70 (1965).

23. *Id.* at 79. The Court upheld the petitioner's contention that the section of the Subversive Activities Control Act requiring individual members of the Communist Party to register with the Justice Department violated the registrant's privilege against self-incrimination because the information which the registrant would be required to divulge upon registration could lead to criminal prosecution the Smith Act or the Subversive Activities Control Act.

24. *Id.* Moreover, the Court equated the written testimony found in the registration statement and oral testimony in terms of prohibitions on compulsion. *Id.* at 78.

25. 88 S. Ct. at 703.

26. 274 U.S. 259 (1927).

the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return and left those answers blank, but could not on that account refuse to make any return at all."<sup>27</sup> Mr. Justice Harlan, however, distinguished *Sullivan* from the present situation stating that in *Sullivan* the questions in the income tax returns were neutral on their face and directed to the public at large, whereas in the instant cases the questions contained in the registration form were directed at a "highly selective group inherently suspect of criminal activity." Since the Internal Revenue Service is not allowed to issue a stamp unless all registration forms are submitted, the petitioners did not, by their failure to assert the privilege to Treasury officials at the moment the tax payments were due, irretrievably abandon their constitutional privilege.<sup>28</sup>

The only argument seriously advanced by the *Kahriger* and *Lewis* Courts in holding that the registration and occupational tax requirements did not infringe on the constitutional privilege against self-incrimination was that compliance with these requirements only indicated that the registrant was contemplating *future* gambling activity, and since they believed that the privilege was only applicable to past and present acts, the privilege was unavailable. The *Kahriger* Court in essence emphasized that the occupational tax registration did not force an applicant to disclose that he had engaged in illegal gambling in the past, but merely disclosed an intent to carry on such occupation in the future—the presumption being that when the gambler is facing charges for actual wagering violations, then, and only then, would it be appropriate to raise the self-incrimination issue. Mr. Justice Harlan found this reasoning to be deficient on two grounds. First, a realistic appraisal of the nature of the tax revealed that substantial hazards of incrimination as to past and present acts stem from the requirements to register and pay the occupational tax. Registration forces incrimination both by coercing a confession of conspiracy to carry on such activity, and by eliciting information which may form a link in a chain of evidence leading to a conviction in that "it compels injurious disclosures which may provide or assist in the collection of evidence admissible in a prosecution of past or present offenses."<sup>29</sup> Second, although acknowledging the fact that there have been no judicial precedents supporting the privilege's application to prospective acts, Mr. Justice Harlan believed that holding the privilege to be entirely inapplicable to prospective acts was an excessively narrow view of the scope of the constitutional privilege stating "it is not mere time

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27. *Id.* at 263.

28. 88 S. Ct. at 704.

29. *Id.* See *supra* notes 15-17. See also McKee, *The Fifth Amendment and the Federal Gambling Tax*, 5 DUKE B. J. 86 (1956).

to which the law must look, but the substantiality of the risks of incrimination."<sup>30</sup> Moreover, the majority held the reasoning in the *Kahriger* and *Lewis* cases that the occupational tax requirements did not infringe upon the constitutional privilege because they do not compel self-incrimination but merely impose upon the gambler the initial choice of whether he wishes, at the expense of his constitutional privilege, to commence wagering activities was no longer persuasive. The essence of this implied waiver concept was the reasoning that even if the required disclosures might prove to be incriminating, the gambler need not register or pay the occupational tax since he had the choice of not gambling at all. The instant Court states, however, that since "[t]he constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and farsighted . . . the constitutional privilege is [not] meaningfully waived merely because those 'inherently suspect of criminal activity' have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither."<sup>31</sup> Finally, even the fragile rationale that admission of plans for future criminal activity is not incriminating is unavailable where the tax is on the proceeds already received (excise tax), since the excise tax requirements are directed at past and present wagering activities.<sup>32</sup>

The instant Court then considered the relevance of the required-records doctrine, *Shapiro v. United States*,<sup>33</sup> to the validity under the Fifth Amendment of the wagering tax provisions and requirements. In essence, the doctrine states that the constitutional privilege safe-guarding a private citizen from the compulsory production of incriminating papers does not extend to records required by administrative regulations to be preserved and filed in a public office. The three requirements necessary for the application of the doctrine, as enunciated in *Shapiro*, are (1) the purpose of the United States inquiry must be essentially regulatory; (2) the information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; (3) the records themselves must have assumed public aspects. Where applicable, the doctrine of *Shapiro* eliminates the privilege against self-incrimination as a basis for refusing to disclose records otherwise private, since as a result

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30. *Id.* at 705. The authority for the argument of the Court in *Kahriger* that the privilege is entirely inapplicable to prospective acts is apparently the generalization of Dean Wigmore at 8 J. WIGMORE, EVIDENCE § 2259(c) (3d ed. 1940). The irrationality of this assertion is criticized more fully in McKay, *supra* note 2, at 221.

31. *Id.* at 704. See Morgan, *The Privilege Against Self-Incrimination*, 34 MINNESOTA L. REV. 1, 37 (1950).

32. 88 S. Ct. at 713.

33. 335 U.S. 1 (1948). In *Shapiro*, the Supreme Court interpreted the immunity provisions of the Emergency Price Control Act to confer immunity only upon a witness required to present evidence covered by the privilege against self-incrimination. The records required to be kept by OPA regulations were not, the Court held, within the reach of the privilege.



of the record-keeping requirement, private records have become *public* records. The *Shapiro* decision permitted Congress to eliminate the privilege in any area which it could conceivably regulate.<sup>34</sup> The Government argued that since the tax statutes in question require that registration statements and gambling records be kept, they become, according to the *Shapiro* decision, sufficiently public to make the privilege altogether inapplicable. But that was apparently not the basis for the holding in *Kahriger* and *Lewis*, for the Court in these two decisions did not discuss the doctrine. However, *Kahriger* and *Lewis* did appear to permit the requirement of incrimination by payment of taxes and registration for the conduct of criminal activities, a result inconsistent with *Albertson*, which, although not discussing the required-records doctrine, forbade registration that could be used to incriminate.<sup>35</sup> Mr. Justice Harlan, facing this inconsistency yet not wishing to re-examine *Shapiro* in regard to the constitutional limits of the required-records doctrine, distinguished *Shapiro* on the ground that the three requirements necessary for an application of *Shapiro* were not present in the instant cases. The petitioners were not obliged to keep and preserve registration statements accompanying payment of the occupational tax because these statements were unrelated to records they may have maintained about their wagering activities, and thus were not customarily kept. While this argument cannot be applied to the excise tax form since pertinent Treasury regulations provide that replies to the questions on this form are to be compiled from the daily records of wagering transactions, there are other points of dissimilarity between this situation and *Shapiro* which preclude any application of the required-records doctrine: Namely, the requirements at issue in *Shapiro* were in an essentially "non-criminal and regulatory area of inquiry" while those here are directed to a "selective group inherently suspect of criminal activities."<sup>36</sup>

Moreover, when *Kahriger* and *Lewis* were decided in 1953 and 1955 the "dual sovereignty" rule made uncertain the extent to which the Fifth Amendment would protect against the disclosures required by the tax, even if the disclosures were found to be incriminating. The essence of the rule was that although both state and federal governments are prohibited by their respective constitutions from coercing testimony which would incriminate under the laws of the particular government, the federal

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34. McKay, *supra* note 2, at 215. In *Shapiro* the Court listed twenty-six statutes, covering most of the important regulatory agencies with parallel provisions. See n.4 at 6 of 335 U.S. 1.

35. For an excellent discussion of the *Shapiro* case and the scope of the required-records doctrine see Meltzer, *Required Records, the McCarran Act and the Privilege Against Self-Incrimination*, 18 U. CHICAGO L. REV. 687 (1951); Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681 (1965).

36. 88 S. Ct. at 713.

government was allowed to coerce testimony which would incriminate only under state law, and the state governments were allowed to coerce testimony which would incriminate only under federal law. Similarly, the prosecutors of each government could use testimony coerced by the other.<sup>37</sup> To whatever extent *Kahriger* and *Lewis* were based on the dual-sovereignty concept, that support was eroded in 1964 by the rulings in *Malloy v. Hogan*,<sup>38</sup> which applied the Fifth Amendment privilege as a limitation on the states, and *Murphy v. Waterfront Commission*,<sup>39</sup> which ended the anomaly of the dual-sovereignty concept.

Having decided that a gambler could invoke the Fifth Amendment as a defense to prosecution under the statutes in issue, the question now confronting the Court was whether, since the wagering tax statutory scheme also has a valid revenue-raising objective, *i.e.*, to reach part of the substantial sums thought to be expended tax free on wagering,<sup>40</sup> prosecution to collect the tax in question was permissible. This question stemmed from a suggestion by the Government that if *Kahriger* and *Lewis* were overruled, the Court should permit the continued enforcement of the gambling tax provisions by simply forbidding federal disclosure to state and federal authorities of the information obtained as a consequence of the compliance with the tax statutes, *i.e.*, confer judicial immunity from prosecutorial use of the testimony demanded.<sup>41</sup> The Court, however, rejected the Government's suggestion, reasoning that since both the statutes and practices under it clearly indicated a congressional purpose that the information obtained as a consequence of the payment of the wagering taxes be provided to interested prosecuting authorities, to impose use-restrictions would preclude effectuation of congressional purpose.<sup>42</sup> Addi-

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37. See *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958).

38. 378 U.S. 1 (1964).

39. 378 U.S. 52 (1964).

40. Mr. Chief Justice Warren, in a dissenting opinion, quoted the President's Commission on Law Enforcement's 1967 task force report as estimating the annual gambling of organized crime as \$7 billion to \$50 billion. 88 S. Ct. at 719.

41. The Government's suggestion was based on a similar immunization of petitioner from federal prosecution in *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). *Murphy* held that where a state grants a witness a valid immunity from prosecution, he may be compelled to testify in state proceedings. However, the federal government is not permitted to make use of such testimony, or the fruits thereof, in a federal prosecution. Further, if a witness is granted a valid immunity from prosecution, he may be compelled to testify, as the reason for asserting the privilege no longer exists. Once immunity is granted and the witness refuses to testify, he may be held in contempt. *Brown v. Walker*, 161 U.S. 591 (1896).

42. The Court emphasized that it would not suffice to sever those provisions of the statute which authorize the Internal Revenue Service to make available to prosecuting officers the information obtained as a result of the wagering statutes. 88 S. Ct. at 708 n.18.

tionally the Court reasoned that the imposition of such restrictions would oblige prosecuting authorities to establish in each case that their evidence was untainted by any connection with the information obtained as a consequence of the wagering taxes, the result being that the federal interest in tax revenue could not be protected without hampering the enforcement of state prohibitions against gambling. Consequently the Court stated that "[w]e cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions . . . the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values."<sup>43</sup>

If the majority had concluded the opinion with the above statement it is submitted that Mr. Chief Justice Warren's argument in the dissenting opinion that the decision was "unnecessarily sweeping" would have merit.<sup>44</sup> The majority, however, in view of the importance of the regulatory and revenue purposes of the tax statutes, emphasized that it is only under the wagering tax system as *presently written* that those who properly assert the constitutional privilege to these provisions may not be criminally punished for failure to comply with their requirements. "[N]othing we do today will prevent either the taxation or the regulation by Congress of activities otherwise made unlawful by state or federal statutes" (emphasis added).<sup>45</sup> It is submitted that the Court seems to imply that if subsequent legislation which would be compatible with the Fifth Amendment were attached to the wagering tax statutes, *i.e.*, if the provisions of the statute were re-drafted so as to provide complete protection from all prosecutions to which the required information is directly or indirectly related, such legislation would overcome any self-incrimination claim. In effect, an immunity provision should be attached to the present statutes if Congress determines that the federal interest in tax revenue is paramount.<sup>46</sup>

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See *supra* note 6. In a dissenting opinion, Mr. Chief Justice Warren stated that the Court had the power to sever these provisions. *Id.* at 720-21.

43. 88 S. Ct. at 708.

44. *Id.* at 721. The crux of Mr. Chief Justice Warren's argument is that the Court should have conferred judicial immunity on the testimony demanded. However, it is submitted that it is doubtful whether the Court could have imposed judicial immunity in this situation. Judicially conferred immunity operates only where a person entitled to the privilege makes disclosures over his objection. But without an immunity statute or a grant of immunity a judge cannot order oral statements or production of written communications that are exempted by the privilege. McKay, *supra* note 2, at 232. In *Murphy*, the Court imposed judicial immunity where there had been an existing grant of immunity by the state.

45. *Id.* at 709.

46. There are now more than forty immunity statutes and a substantial number of state immunity statutes. For a listing of the federal statutes see Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568, 1611-12 (1963). To be valid, the immunity statute must be co-extensive with the

By these decisions, the Court has indicated that all registrations, whether or not attached to special tax provisions,<sup>47</sup> will be rendered ineffective by a proper assertion of the privilege against self-incrimination if the practice under them clearly furthers a congressional purpose to gather evidence from citizens in order to secure their conviction of crime.<sup>48</sup> If subsequent legislation, in the form of immunity provisions, are attached to such registration statutes the vitality of the statutes as regulatory measures will be preserved while precluding from prosecutorial use the information obtained as a result of such registration.

The privilege against self-incrimination, moreover, has undergone a significant re-examination in the instant cases. The Supreme Court has, by its present decisions, provided further clarification of the constitutional doctrine surrounding the privilege against self-incrimination by its elimination of the ambiguities and inconsistencies found between the principles enunciated in *Kahriger* and *Lewis*, and those expounded in the recent decisions of *Malloy*, *Murphy*, and *Albertson*. The Court has indicated that if the privilege is to have any real meaning, it should apply to defeat any legislative scheme of incrimination by required confession. Thus, where as here, one of the prime purposes and effects of federal enactments was to bring to the attention of prosecutors, violations of state law, such statutes clearly infringe on the personal rights of the citizen guaranteed by the Constitution, and the self-incrimination privilege will afford that citizen protection. While the decisions necessarily defeat any congressional objective to aid state and federal officials in the prosecution of those who violate local gambling prohibition enactments, the decisions do leave the door open for the government to secure at least payment of the tax and completion of the registration forms. The decisions do not render ineffective the required-records doctrine or statutes, but only modify slightly the doctrine in that the decisions per-

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privilege it displaces, *i.e.*, it must preclude prosecution for *any* offense related to the testimony. *Council v. Hitchcock*, 140 U.S. 547, 585-86 (1892). Where the statute does not offer this protection, the witness is not compelled to give testimony over his objection. *Cf. Albertson v. SACB*, 382 U.S. 70 (1965).

47. Registration of those liable for special taxes is a common and integral feature of the tax laws. *See* INT. REV. CODE of 1954, § 7011. For example, the following provisions impose occupational taxes and subjects the taxpayer to the registration requirements of § 7011: §§ 4721 and 4702(a)(2)(C) (those who deal in narcotic drugs); § 4751 (dealers in marijuana; § 5101 (manufacturers of stills); § 5801 (dealers in certain firearms). The registration requirements apply uniformly to those engaged in such occupation lawfully and those whose activities would make them liable for criminal prosecution. There are also many other federal registration statutes besides the tax statutes.

48. The very day *Marchetti* and *Grosso* were decided, the Court, adhering to its decisions in these two cases, ruled that petitioner's claim of the constitutional privilege against self-incrimination provided a complete defense to prosecutions either for failure to register firearms under § 5841 of the Internal Revenue Code of 1954 or possession of unregistered firearms under § 5851. *Haynes v. U.S.*, 88 S. Ct. 722 (1968).

mit restoration of the privilege to records normally private, except for the record-keeping requirement, without limiting the power of the government to secure information necessary for its effective operation. As one commentator suggests, extension of the required-records doctrine to an area "permeated with criminal statutes" would invite complete nullification of the privilege by a network of registration statutes.<sup>49</sup>

Donald J. Burns

EMINENT DOMAIN—RIPARIAN RIGHTS—The Supreme Court reaffirms its decision in *United States v. Twin City Power Co.*, 350 U.S. 222 (1956) and holds that the government may disregard the value of land arising from the fact of riparian location in compensating the owner when fast lands are appropriated.

*United States v. Rands*, 88 S. Ct. 265 (1967).

In *United States v. Rands*<sup>1</sup> the owner of riparian land on the Columbia River in Oregon had leased his land to the State, with an option to buy. The land was to be used as an industrial park, and part of it was to be used as a port. The United States Government, however, condemned the land and reconveyed it to Oregon at a price much lower than that of the option price for which the owner had expected to sell. The value of the land determined by the judge in the condemnation proceeding was limited to its value for sand, gravel, and agricultural purposes. Its special value as a port site was not taken into consideration, and consequently the owner received about one-fifth of the claimed value of the land as a port site.

The Court of Appeals for the Ninth Circuit reversed the decision,<sup>2</sup> concluding that port site value was an element of "just compensation" under the Fifth Amendment, and the Supreme Court granted certiorari.<sup>3</sup>

The Court, apparently desiring to dispel any possibility of future doubts and ambiguities in the lower courts' decisions on this question, emphatically reaffirmed the controversial *United States v. Twin City Power Co.*,<sup>4</sup> which held that the United States Government, when appropriating lands riparian to a navigable stream for use as a power site, does not have to compensate the owner for the added value of his land which inures to it due to the flow of the stream. Although asked to distinguish between the added value of land when condemned for use as a power site,

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49. McKay, *supra* note 2, at 222.

1. *United States v. Rands*, 88 S. Ct. 265 (1967).

2. *United States v. Rands*, 367 F.2d 186 (9th Cir. 1966).

3. 88 S. Ct. 265 (1967).

4. *United States v. Twin City Power Co.*, 350 U.S. 222 (1956).